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**A** Federal Trade Commission.

**A** Final rule.

**A** Section 205 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 requires the Federal Trade Commission to issue a rule to prevent deceptive marketing of free credit reports. To that end, the Commission amends the Free Annual File Disclosures Rule to require certain advertisements for “free credit reports” to include prominent disclosures designed to prevent consumers from confusing these “free” offers with the federally mandated free annual file disclosures available through the single centralized source. In addition, the final amended Rule requires nationwide

<sup>2</sup> Section 603(p) of the FCRA defines a “nationwide consumer reporting agency” as a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. 15 U.S.C. 1681a(p). At this time, there are three nationwide consumer reporting agencies – Equifax Inc. (“Equifax”), Experian Information Solutions, Inc. (“Experian”), and TransUnion LLC (“TransUnion”).

<sup>3</sup> Nationwide specialty consumer reporting agencies are defined in section 603(w) of the FCRA. 15 U.S.C. 1681a(w). Specifically, section 603(w) defines “nationwide specialty consumer reporting agency” as a CRA that compiles and maintains files on consumers on a nationwide basis relating to: (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims.

<sup>4</sup> 15 U.S.C. 1681j.

<sup>5</sup> Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009).

<sup>6</sup> Prior to the FACT Act, consumers could purchase file disclosures from consumer reporting agencies, but could receive a free file disclosure only under limited circumstances. For example, section 615 of the FCRA provides that consumers denied credit or employment based upon information contained in a consumer report may obtain a free file disclosure from the CRA that provided the report. 15 U.S.C. 1681m.

<sup>7</sup> 16 CFR 610.2(h). The Commission staggered implementation of the original Rule across the

country to manage requests for free annual file disclosures.

<sup>8</sup> Most requests for free annual file disclosures through the centralized source occur through the AnnualCreditReport.com website. AnnualCreditReport.com is the only federally authorized website for obtaining free annual file disclosures.

<sup>9</sup> 16 CFR 610.2(a).

<sup>10</sup> 74 FR 52915 (Oct. 15, 2009).

<sup>11</sup> “FreeCreditReport.com” is owned and operated by Consumerinfo.com, Inc., an Experian company.

<sup>1</sup> 16 CFR Part 610.

<sup>12</sup> As discussed in the NPRM, the Commission has undertaken enforcement and extensive education to address these practices. For example, in 2005, the Commission filed an action against Consumerinfo.com, Inc., a marketer of “free credit reports.” *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal. Aug. 15, 2005). In that action, the Commission alleged that Consumerinfo.com, Inc., which advertised “free credit reports” to consumers on the Internet, through emails, and through television and radio advertisements, engaged in deceptive acts or practices in violation of section 5 of the FTC Act, 15 U.S.C. 45(a). These deceptive practices included failing to disclose or to disclose adequately that the “free” credit reports they were offering were not associated with the federally-mandated annual free credit report program, but rather were part of a commercial promotion. The settlement required Consumerinfo.com, Inc., to pay consumer redress, prohibited it from making deceptive and misleading claims about “free” reports, and required disclosure of the terms and conditions of any “free” offers. The defendant also agreed to forgo \$950,000 in ill-gotten gains. Two years later, the Commission entered a second order with Consumerinfo.com, Inc., settling allegations that it violated the 2005 order. *FTC v. Consumerinfo.com, Inc.*, SACV05-801 AHS (MLGx) (C.D. Cal., Jan. 8, 2007) (prohibiting defendant from failing to make required disclosures mandated by the 2005 order and requiring \$300,000 payment for consumer redress).

<sup>13</sup> 74 FR 52915 (Oct. 15, 2009). The Commission released a version of the NPRM on its website on October 7, 2009.

<sup>14</sup> *Id.* at 52918-22.

<sup>15</sup> *Id.* at 52922.

<sup>16</sup> The comments are available at (<http://www.fcc.gov/oc/recordkeeping/efile/index.html>).

<sup>17</sup> NCLC at 3; State of Florida at 4; State of Minnesota at 3.

<sup>18</sup> Only a few consumers stated that Commission action is unnecessary. See M. Buckley; K. Hix; P. Johnson.

<sup>19</sup> *E.g.*, C. Thompson (“I signed up for freecreditreport.com, and couldn’t find out [how] to cancel the membership I didn’t want in the first

<sup>20</sup> *E.g.*, M. Neal (“The phony ‘free’ credit report come-ons are confusing and thwart citizens who are trying to exercise their right to obtain an annual credit report.”); G. Albelo (“[T]he free credit report site is guaranteed to manipulate one into paying for a service that should be free. The site is a maze of

obtained his or her free annual file disclosure generated a substantial number of comments. Consumer advocates and many consumers either supported the proposal, or stated that it did not go far enough. For example, NAAG, as well as over 255 consumers, supported the proposal.<sup>32</sup> Others, including NCLC, the States of Florida and Minnesota, as well as over 250 consumers, recommended a complete ban of all advertising on the centralized source. A typical consumer comment stated: "The FTC should remove all advertising and marketing by the credit bureaus before, during and even after the process of getting a free credit report. People should be able to get their reports and exit the Web site without having to go through a gauntlet of sales pitches."<sup>33</sup> Similarly, another consumer stated: "Why aren't the free reports on a commercial-free site where I can go in, give the information I need without worrying who I'm giving it to, without a gauntlet of commercials and confusing links that send me to more places that want to get my money?"<sup>34</sup>

Industry and business groups, in contrast, opposed the proposal. One CRA noted that the centralized source is a springboard for providing consumers with beneficial credit-related products and services.<sup>35</sup> This commenter also argued that the proposed delay of advertising would prevent CRAs from complying with section 609(a)(6) of the FCRA, which requires CRAs to provide a statement that consumers can request a credit score when a consumer requests a credit file.<sup>36</sup> CDIA suggested that a better approach would be to require that advertisements for additional products or services on the centralized source be "no more conspicuous" than the

centralized source's features for obtaining free annual file disclosures.<sup>37</sup>

The Commission has carefully considered these comments and has retained the restriction on advertising until after the consumer has obtained his or her file disclosure. As noted in the NPRM, the general standard contained in the original Rule, that advertising not "interfere with, detract from, contradict, or otherwise undermine" the centralized source, has not been effective in ensuring that consumers have an unfettered, easy-to-use mechanism for obtaining their free annual file disclosure. Consumers have been subjected to substantial amounts of advertising for the nationwide CRAs' proprietary products or services while navigating AnnualCreditReport.com to obtain their free annual file disclosures. Indeed, when consumers access the website, they encounter offers for a variety of add-on goods or services – such as credit scores and credit monitoring services – which they must purchase or decline, one by one, before obtaining their free annual file disclosures. These advertisements make it cumbersome and time consuming for consumers to exercise their right to obtain their free annual file disclosures.<sup>38</sup>

A substantial number of commenters confirmed that existing advertising impedes consumers' ability to obtain their free annual file disclosures on AnnualCreditReport.com. As one consumer noted, "[a]s a user of the annualcreditreport website, I feel it is like tiptoeing through a minefield to try to get past all the paid offers to the actual free credit report guaranteed by Federal law."<sup>39</sup> Another consumer stated that "If you are not extremely careful it is almost impossible to avoid ordering a product that is available only for a fee."<sup>40</sup> The comments confirm the problems the Commission articulated in the NPRM, and thus, the Commission continues to believe that a delay in advertising is necessary to ensure that consumers can exercise their federal right to obtain their free annual file disclosures, without unnecessary obstruction and delay.

The Commission recognizes that prohibiting all advertising on AnnualCreditReport.com would advance the Commission's interest in

restricting aggressive advertising that impedes consumers' ability to obtain free file disclosures. The Commission believes, however, that the less restrictive approach of delaying advertising would achieve its goal of improving "the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports."<sup>41</sup> Delaying such advertising or other communications<sup>42</sup> enables consumers to focus first on obtaining their free annual file disclosure and decide thereafter whether to purchase 42" (AnnualCred208lso )Tj/F1 1 Tf3.8654 0 TD(K. C retained the Tj-12.1938 -1.10 9-20.5032 -1.1429 TD- use mechamake the pr666 -1.1 TDcreditminefualCn

<sup>32</sup> See, e.g., NAAG at 2; *ee al o* Empire Justice at 4 (urging the Commission to "[r]emove all 'pop-up ads' and any other advertising on the pages that a consumer must use to access his or her credit report.").

<sup>33</sup> N. Guzman.

<sup>34</sup> B. Irwin; *ee al o*, J. Matey ("There should be NO ADVERTISING on the free report pages."); R. Robinson ("[P]lease make them take all forms of advertising for a paid service completely off the 'free' website."); P. Wilson ("There should be no selling involved with the request for a free credit file review. There is no need to sell anything. Let's make the process transparent and just provide what is requested."); B. Meyer ("AnnualCreditReport.com should be commercial free!"); C. Epley ("Remove all advertisements! This page exists for me, the public, not for the firms who sell credit reports."); Munsch ("Remove all advertising and marketing by credit bureaus entirely before, during and after the process of getting the free credit report. One should be able to obtain the report(s) and exit without enduring sales pitches.").

<sup>35</sup> TransUnion at 3.

<sup>36</sup> *Id.*

<sup>37</sup> CDIA at 5.

<sup>38</sup> 74 FR at 52917. The Commission also noted that consumers reported feeling compelled to purchase the advertised products or services in order to obtain their free annual file disclosure.

<sup>39</sup> See T. Hillegass.

<sup>40</sup> See W. Stuart; *ee al o* K. Graham ("This site is currently the best example of 'limiting access by obfuscation' that I have ever seen.").

<sup>41</sup> 15 U.S.C. 1681j(a)(1)(C)(ii)(III). CDIA asserted that the Commission lacks any statutory authority to implement the proposal to delay advertising. CDIA at 3 ("The FTC lacks the authority to prescribe rules that prohibit the consumer reporting agency's advertising or marketing of products or services after the consumer's request has been received and when the consumer reporting agency is fulfilling that request."). In response, the Commission notes that its authority for amending this provision in the original Rule derives from the rulemaking authority in the FACT Act amendments to the FCRA and the Commission's authority to amend its rules under the Administrative Procedure Act. 15 U.S.C. 1681j; 5 U.S.C. 551(5) and 553. Congress initially authorized the Commission to promulgate the Free Reports Rule to establish the centralized source. In promulgating this Rule, Congress required the Commission to consider "the ease by which consumers should be able to contact consumer reporting agencies . . ." The proliferation of distracting or confusing advertising and marketing on the centralized source affects its "ease" of use, and it is therefore within the Commission's authority to amend the original Rule to address this issue.

<sup>42</sup> As discussed below, the final amended Rule revises proposed section 610.2(g)(1) to restrict any request by a CRA to establish an account until after the consumer has obtained his or her file disclosure.

<sup>43</sup> The Commission will monitor and evaluate the effectiveness of this provision and may take additional action, as necessary.

<sup>44</sup> As stated in the NPRM, a file disclosure is "delivered" for purposes of this section when it is provided in a form that permits the consumer to store, download, print, or otherwise maintain the



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<sup>53</sup> BBB at 3; *see also* NAAG at 2; E-Commerce at 2 (supporting a provision barring sites from requiring consumers to register in order to obtain the annual file disclosure).

<sup>54</sup> TransUnion at 6-7; *see also* CDIA at 6.

<sup>55</sup> Requiring the establishment of an account is contrary to existing Commission commentary on the provision of file disclosures. *See* FTC Commentary on the Fair Credit Reporting Act, 16 CFR 600 Appendix, comment 610-2 (“A consumer reporting agency may not add conditions not set out in the FCRA as a prerequisite to the required disclosure.”).

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<sup>56</sup> NAAG at 2; Schwartz & Ballen at 3-4.

<sup>57</sup> TransUnion at 7 (asserting that terms and conditions are justified because consumers are obtaining immediate access to file disclosure).

<sup>58</sup> *See* 15 U.S.C. 1681h(a)(1).

<sup>59</sup> In response to TransUnion’s comment, if a consumer is determined to access someone else’s file disclosure, it is unclear how requiring that person to agree to terms and conditions will serve as a deterrent. In any event, TransUnion does not require terms and conditions for mail or telephone requests for free credit reports; thus, requiring such

centralized source. Proposed section 610.4 also provided that if the centralized source's website (currently AnnualCreditReport.com) or toll-free telephone number (currently 877-322-8228) were to change, the centralized source must substitute the new website or toll-free telephone number in all disclosures required by this section of the Rule. In response to the NPRM, the Commission received only one comment. CDIA agreed with the proposed definition, but urged the Commission to include a reference to a "reasonable time" in order to provide the centralized source an opportunity to update the disclosures.<sup>62</sup> The Commission believes this modification is appropriate and has revised the proposed Rule accordingly.

b. Section 610.4(a)(2): The term "free credit report"

Proposed section 610.4 set forth the following definition of "free credit report":

*Free credit report.* For the purposes of this section, "free credit report" means a consumer report or file disclosure that is prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act); that is represented, either expressly or impliedly, to be available to the consumer free of charge; and that is, in any way, tied to the purchase of a product or service.

As noted in the NPRM, the term "free credit report" is undefined in section 205 of the Act, the FCRA, or the Free Reports Rule.<sup>63</sup> The Commission defined the phrase in the proposed Rule, however, in order to clarify the scope of the Rule's disclosure requirements. As explained more fully below, based on the comments received, the Commission has revised the proposed definition of "free credit reports" as follows:

*Free credit report.* means a file disclosure prepared by or obtained, directly or indirectly, from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act), that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

<sup>62</sup> CDIA at 9 ("[T]he FTC should clarify in the Rule that covered entities will be provided with a reasonable opportunity to update the information.")

<sup>63</sup> 74 FR at 52918.

i. Scope of the term "free credit report"

Proposed section 610.4 defined "free credit report" to include "a consumer report or file disclosure prepared by or obtained . . . from a nationwide consumer reporting agency (as defined in section 603(p) of the Fair Credit Reporting Act)." NCLC and TransUnion urged the Commission to broaden the definition to include reports offered by nationwide specialty CRAs.<sup>64</sup> In that regard, TransUnion stated: "As a general matter, it is not clear why this provision pertains to Free Reports involving only nationwide CRAs. If an entity is advertising a 'free credit report,' it would seem that the disclosures are appropriate regardless of the provider or source of information."<sup>65</sup> NCLC also observed that the statutory language of the Act is not limited to nationwide CRAs.<sup>66</sup>

On the other hand, several commenters, including CDIA and Experian, urged the Commission to narrow the definition of "free credit report," asserting that section 610.4 should cover only file disclosures of the type that the nationwide CRAs must make available through the centralized source. For example, Experian's comment states:

[The statute] seeks to assure that consumers will be able to distinguish between a free credit report offered by a commercial entity and the free annual file disclosures available at [AnnualCreditReport.com]. The statute does not cover other aspects of the consumer credit system such as credit scores or the many other types of information that can qualify as 'consumer reports' under the FCRA.<sup>67</sup>

The Commission agrees that the NPRM's inclusion of the term "consumer report" in the proposed definition of "free credit report" was too broad, sweeping in the offer of reports that go beyond the requirements of section 205 of the Act, and potentially adding to consumer confusion. Section

<sup>64</sup> NCLC at 4; TransUnion at 8. At the same time, NCLC noted that the disclosures set forth in the Act for nationwide CRAs would have to be modified if applied to nationwide specialty CRAs by omitting references to AnnualCreditReport.com. NCLC at 4.

<sup>65</sup> TransUnion at 8.

<sup>66</sup> NCLC at 4.

<sup>67</sup> Experian at 28-29; *see also* Schwartz & Ballen at 2 ("CRAs . . . offer their services in connection with their sponsorship of the website AnnualCreditReport.com, which is where consumers may obtain their free credit reports under Federal law."); CDIA at 8 (asserting that the proposed definition would "apply to many products and services that are not in direct competition with the credit file disclosures required to be made available through the centralized source because the Free Annual File Disclosures Rule cannot and does not require similar options.")

205 was intended to address the confusion between the information offered through the centralized source and similar information offered from private or other commercial sources. Indeed, the disclosures contemplated by section 205 of the Act would not be useful, for example, for advertising of offers of consumer reports from nationwide specialty CRAs, as those reports are not available through the centralized source. Similarly, the term "consumer report" would include "credit scores;" thus, under the proposed Rule, an advertisement for a "free credit score" would have triggered the requirement to disclose the existence of AnnualCreditReport.com. Consumers seeing an advertisement for a free credit score might be confused if they are directed to AnnualCreditReport.com, only to find that they could not get a free credit score on that site. Accordingly, section 610.4 of the final amended Rule is limited in scope to reports of the type disseminated through the centralized source.

ii. Applicability of the term "free credit report" to trial offers

The definition of "free credit report" in proposed section 610.4 applied to an offer of free credit reports "that is, in any way, tied to the purchase of a product or service." Several commenters objected to the use of the phrase "in any way, tied to the purchase of a product or service." NAAG suggested that the term "purchase" might be interpreted to exclude negative option offers, where the consumer may cancel the purchase before having paid anything: "If a consumer receives a free credit report and cancels any service within the allotted time without paying anything, some may argue that the report is not technically 'tied to the purchase of a product or service.'"<sup>68</sup>

The Commission agrees and has changed the definition of "free credit report" to better clarify the types of "free credit report" offers intended to be covered by the Rule – those "represented, either expressly or

<sup>68</sup> NAAG at 2-3. Similarly, the States of Florida and Minnesota urged that the definition cover trial offers or trial periods. State of Florida at 6 ("The definition of 'free credit report' should encompass . . . trial subscriptions to make it abundantly clear that trial offers are covered."); State of Minnesota at 3 ("The FTC should adopt a broad definition of 'free credit report' that explicitly covers . . . trial periods."). Other commenters expressed confusion about the phrase "tied to" the purchase of a product or service. For example, NCLC noted that the term "tied to" could be confused with the antitrust concept of "tying," where a seller conditions the sale of one product or service on the customer's agreement to take a second product or service. NCLC at 5.



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<sup>69</sup> Section 610.4(a) of the final amended Rule makes clear that representations made both expressly and impliedly about an offer of a “free credit report

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phrase “that undermines” for the phrase “in mitigation.”<sup>92</sup> Accordingly, the relevant portion of section 610.4(a)(3)(vi) of the final amended Rule reads, “nothing that is contrary to, inconsistent with, or undermines the required disclosures shall be used in any advertisement in any medium . . . .”

### 3. Section 610.4(b): Medium-specific advertising disclosures

Proposed section 610.4(b) set forth the statutory requirements relating to prominence in specific media. The wording and presentation of required disclosures for each medium are described below.

#### a. Section 610.4(b)(1): Disclosures for television advertisements

Section 205 of the Act prescribes the specific wording of the disclosures for television, requires that the disclosures be made in both audio and video formats, and requires the audio and video disclosures to be made at the same time.<sup>93</sup> Accordingly, consistent with the Act, proposed section 610.4(b)(1) required that all advertisements for “free credit reports” broadcast on television include the following disclosure: “This is not the free credit report provided for by Federal law” in the audio and visual parts of the advertisement at the same time. Proposed section 610.4(b)(1) also required that the disclosure be at least four percent of the vertical picture height, and appear for a minimum of four seconds. This requirement is consistent with comparable Federal Election Commission requirements for the disclosure of the funding source of a political advertisement on television.<sup>94</sup>

The Commission received few comments on this proposed section. NAAG suggested that the Commission add the following statement to the disclosure: “This report is only free if you make a purchase.”<sup>95</sup> As noted above, however, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission’s Rule follows this wording.

<sup>92</sup> Further, the phrase “that undermines” is drawn from and parallel to other sections of the original Rule. See 16 CFR 610.2(g)(1), renumbered as section 610.2(g)(2) in the final amended Rule (prohibiting “communications . . . [that] undermine the purpose of the centralized source”).

<sup>93</sup> Section 205(a)(2): “In the case of an advertisement broadcast by television or radio, the disclosure required under paragraph (1) shall be included in the audio and visual part of such advertisement.”

<sup>94</sup> See 11 CFR 110.11(c)(3)(iii)(B).

<sup>95</sup> NAAG at 3.

One commenter disagreed with the proposed Rule’s use of the Federal Election Commission requirements for the size of the visual disclosure, asserting that the standard is “overly rigid and excessively burdensome.”<sup>96</sup> The commenter did not provide any additional information or support; nor did it offer an alternative standard. The Commission continues to believe that the Federal Election Commission requirements provide a useful standard for prominent disclosures in television advertisements. Accordingly, the Commission retains this standard in the final amended Rule.

In addition, NAAG, the State of Florida, and NYCPB offered several suggestions regarding the timing of the disclosure. For example, the State of Florida suggested that the visual disclosure appear throughout the entire advertisement and that the size of the disclosure be at least as large as the company name.<sup>97</sup> NYCPB suggested that the disclosure “should be provided at the front or beginning of the advertisement” to be consistent with the proposed Internet website disclosure.<sup>98</sup> NAAG suggested that the disclosure be “equally prominent and in close proximity to the triggering claim . . . .”<sup>99</sup>

The Commission agrees that, consistent with long-standing Commission interpretations of prominence, the audio and video disclosure should appear in close proximity to the first mention of a free credit report. Indeed, as FTC staff has stated in its prior business guidance, “[a] disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosures and relate it to the relevant claim or product.”<sup>100</sup> In keeping with this principle, section 610.4(b)(1)(i) now reads, “all advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: ‘This is not the free credit report provided for by Federal law.’”<sup>101</sup>

<sup>96</sup> Schwartz & Ballen at 5.

<sup>97</sup> State of Florida at 7.

<sup>98</sup> NYCPB at 2.

<sup>99</sup> NAAG at 3.

<sup>100</sup> See Federal Trade Commission Guidance, Dot Com Disclosures: Information about Online Advertising, at 6, *a ailable a\_ (h\_ :// .f.c.go / bc /ed / b /b i e /eco e ce/b 41. df)* (“Dot Com Disclosures”).

<sup>101</sup> In response to commenters’ additional suggestions to address prominence in television advertising, the Commission notes that, rather than adding specific requirements to this section, it has tried to tighten the prominence requirements for all disclosures, as discussed above.

#### b. Section 610.4(b)(2): Disclosures for radio advertisements

Proposed section 610.4(b)(2) also incorporated the section 205 disclosure for all advertisements for “free credit reports” broadcast on radio: “This is not the free credit report provided for by Federal law.”

Similar to the television disclosure, NAAG suggested that the Commission add to the disclosure the following statement: “This report is only free if you make a purchase.”<sup>102</sup> As noted above, the statute specifies the wording of the disclosure for television and radio advertisements, and the Commission’s Rule follows this wording.

With respect to the timing of the disclosure, NAAG suggested that it appear “in close proximity to the triggering claim . . . .”<sup>103</sup> Another commenter suggested that the disclosure “should be provided at the front or beginning of the advertisement” to be consistent with the proposed Internet website disclosure.

<sup>102</sup> NAAG at 3.

<sup>103</sup> *Id.* In addition, NAAG and the State of Florida offered suggestions regarding the placement and/or audibility of the disclosures. These comments are addressed in the discussion of the general requirements for prominent advertising disclosures above.

<sup>104</sup> NYCPB at 2.

to receive what is advertised as a free credit report.<sup>105</sup>

States and consumer advocates generally supported the proposal and offered suggestions to make the disclosure more prominent. For example, NAAG suggested that the disclosure should be equally prominent and in close proximity to the triggering claim of “free” or “free credit report.”<sup>106</sup> The State of Florida and NYCPB suggested that the Rule include formatting requirements, such as the use of a border or contrasting color.<sup>107</sup> NCLC suggested that the Rule include placement requirements for the disclosure, such as near the most prominent listing of the website or telephone number for the commercial entity and, for multi-page advertisements, on the front side of the first page of the principal promotional document.<sup>108</sup> In addition, Schwartz & Ballen suggested that the second sentence of the disclosure should be the same as the language for the interim disclosure specified in the Act because it is more clear than the disclosure proposed in the NPRM.<sup>109</sup>

The Commission agrees that the print disclosures should be made more prominent, and accordingly has modified the proposal in several ways. First, the Commission has added a general prominence requirement and strengthened the general requirements for visual disclosures in the final amended Rule, as discussed above. All of these requirements apply to print advertising.

Second, proposed section 610.4(d)(3) required only that the disclosure text be one-half the size of the largest letter or numeral *edi he eb i e add e o ele ho e be* to which consumers are referred to obtain their “free credit report” listed in the print advertisement. Section 610.4(b)(3) of the final amended Rule provides that each letter of the disclosure text shall be, at minimum,

<sup>105</sup> As noted in the NPRM, this approach is identical to that of the Pay Per Call Rule, section 308.3(b)(v)(2)(i).

<sup>106</sup> NAAG at 4.

<sup>107</sup> State of Florida at 7; NYCPB at 2.

<sup>108</sup> NCLC at 5.

<sup>109</sup> Schwartz & Ballen at 6. Section 205(b)(3) of the Act provides that the interim disclosure shall include “Free credit reports are available under Federal law at: ‘AnnualCreditReport.com’.” In addition, CDIA commented that the proposed disclosure exceeds the Commission’s statutory authority because of the inclusion of the first sentence and suggested that the disclosure should be limited to the second sentence. CDIA at 13. As stated in the NPRM, section 205 of the Act does not specify the wording of the advertising disclosure required in print advertisements. Rather, it only requires that the disclosure be “prominent” and authorizes the Commission to determine the appropriate wording of the advertising disclosure through this rulemaking.

one-half the size of the largest character *edi he ad e i e e e*. Linking the type size of the disclosure to the largest character used in the entire advertisement (as opposed to only the website address or the telephone number), combined with the general requirements of section 610.4(a) of the final amended Rule, will strengthen the prominence of the print disclosure.

Third, the Commission agrees with the comments suggesting inclusion of a requirement that the disclosure be in close proximity to the free report claim. As with the radio and television disclosures, this modification is consistent with longstanding FTC practice requiring disclosures be made in close proximity to the triggering claim. Thus, the final amended Rule provides that the required disclosure appear in close proximity to the first mention of a “free credit report.”<sup>110</sup>

With respect to the comment on the text of the disclosure, the Commission agrees that the text could be clearer. Particularly when the disclosure is made in close proximity to the offer of a free credit report, the consumer might be confused by conflicting messages. For example, a consumer might see an advertisement saying “get a free credit report” and, in close proximity, the consumer would see the disclosure that begins with the phrase “This is not the free credit report . . .” The Commission believes that the juxtaposition of the two messages – particularly when placed in close proximity – would likely cause consumer confusion, and has changed the disclosure text in two respects to address this issue.

First, the Commission has added a requirement that the disclosure include the following header centered on the first line of the disclosure: “THIS NOTICE IS REQUIRED BY LAW.” This header clarifies that the disclosure is coming from a source other than the commercial entity advertising a free credit report. In addition, the requirement to include a header is consistent with numerous other Commission rules that title disclosures to alert consumers to the importance of the message delivered.<sup>111</sup>

Second, rather than starting the disclosure with the sentence “This is not the free credit report provided by

<sup>110</sup> For example, a print advertisement that features a “free credit report” offer at the top of the page, intervening text, and the disclosure at the bottom of the page would not satisfy the close proximity requirement.

<sup>111</sup> See, e.g., Cooling Off Rule, 16 CFR Part 429 (requiring a form captioned either “NOTICE OF RIGHT TO CANCEL” or “NOTICE OF CANCELLATION”); Prescreen Rule, 16 CFR Part 642 (requiring a form captioned “PRESCREEN AND OPT-OUT NOTICE”).

federal law.”, the final amended Rule’s disclosure includes only the affirmative statement: “You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the ONLY authorized source under federal law.” The Commission notes that beginning the disclosure with the phrase “This is not the free credit report” could be confusing in that it may be unclear what the term “this” refers to. Thus, the Commission believes that these changes make the required disclosure clearer for consumers.<sup>112</sup>

d. Section 610.4(b)(4): Disclosures for Internet websites

Proposed section 610.4(b)(4) required any website offering “free credit reports” to first display on a separate landing page the following visual disclosure: “This is not the free credit report provided for by Federal law. To get your free report, visit

( *.A alC edi Re o \_co* ) or call 877-322-8228.” Proposed section 610.4(b)(4) also required that the separate landing page contain no other information aside from the statement: “Go to [hyperlink to company’s website.]” Further, the disclosure was to: (1) be visible to consumers without requiring them to scroll down the webpage; (2) contain an operational hyperlink directing consumers to ( *.A alC edi Re o \_co* ) that appears before the hyperlink to the advertised company’s commercial website; and (3) be in a type at least twice the size as the hyperlink to the company’s website or display of the company’s Uniform Resource Locator. Finally, proposed section 610.4(b)(4) provided that the separate landing page must occupy the full screen and that no other information, graphics, or material could be shown to the consumer unless and until the consumer affirmatively selected one of the two hyperlinks described above.<sup>113</sup>

Consumer advocates such as NCLC, as well as NAAG, the States of Florida and Minnesota, Senator Levin, and many individual consumers generally supported the proposed separate landing page requirement. Some consumer advocates recommended strengthening the proposed separate landing page. For example, NCLC commented that the separate landing page should appear in multiple

<sup>112</sup> The potential for confusion with the disclosure in the proposed Rule text is also discussed in the section on Internet website disclosures below. The text of the disclosure for all media, except for television and radio (for which the text of the disclosure is statutorily mandated), has been modified in a similar way, for consistency.

<sup>113</sup> 74 FR at 52927.



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<sup>126</sup>The Commission has deleted the requirement that the disclosure be “visible to consumers without requiring them to scroll down the webpage.” The Commission believes that the general “prominence” requirement addresses this point; in addition, the

<sup>133</sup> A few commenters questioned the different type size requirements for print advertisements and Internet websites. *See* AOL, Microsoft, Yahoo! at 2; IAB at 4. The Commission reviewed these comments and concludes that the different nature of these media demands different type size requirements for the disclosure. Specifically, an Internet website requires a larger type size for the disclosure because it is the location from which consumers have the ability to place an order for a “free credit report.” In contrast, print advertisements direct consumers to another source, such as a telephone number or Internet website, to order a “free credit report” and consumers will receive another disclosure at that time. In addition, there may be greater space limitations in some print media that do not exist on Internet websites.

The final amended Rule also clarifies that “characters” includes those in an image or graphic banner – not just characters technically coded on the Internet website as text.

<sup>134</sup> The final amended Rule already requires that the hyperlink to *AnnualCreditReport.com* be in a high degree of contrast to the background of the box containing the disclosure; linking the color of the button to the color of the hyperlink will ensure that both elements will appear in high contrast to the background color of the box. In addition, tying the two colors together will create a visual cue that clicking on either link will get the consumer to the authorized source. The Commission notes further that the requirement that the two links be the same color applies to the page as the consumer initially views it. For example, the Rule is not violated if the two links appear initially in the same color, a consumer clicks the hyperlink, returns to the site, and finds that the hyperlink subsequently appears in a different color.

<sup>135</sup> This requirement will ensure the prominence of the button because the button must be large enough to accommodate the required text in the required size.

<sup>136</sup> As discussed in the NPRM, Congress’ use of the word “prominent” must be viewed as an expression of intent that the new disclosures be

the Rule's general prominence requirement applies.<sup>140</sup>

The Commission will monitor and evaluate the effectiveness of this section and innovations in technology and advertising and will consider additional changes as necessary to achieve the statutory mandate.

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<sup>140</sup>The Commission notes that this section applies to Internet-hosted multi-media *advertising*, as opposed to Internet websites. Internet websites with audio and visual components must comply with the disclosures for Internet websites.

<sup>141</sup>The timing requirement drew from the Commission's Telemarketing Sales Rule, which, among other things, prohibits telemarketers from failing to disclose that the purpose of the call is to sell goods or services and the nature of the goods or services. 16 CFR 310.3.

<sup>142</sup>Schwartz & Ballen at 7 (asserting that consumers will likely interpret the required disclosure at the beginning of a telephone call to mean that they have dialed an incorrect telephone number and will likely terminate the telephone call).

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<sup>143</sup>The Commission notes that the word "free" was inadvertently omitted in the proposed Rule. Indeed, the Section-by-Section discussion of the NPRM correctly defined the trigger as "the first mention of 'free credit report.'" 74 FR 52921-22. In addition, as with the language for telephone requests, the language of the disclosure required by this section has been modified consistent with the changes for print advertisements.

<sup>144</sup>In addition to the proposed revisions and additions discussed above, proposed section 610.2(b)(2)(iv)(D) removes an erroneous reference to "national credit reporting agencies."

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<sup>145</sup>Manatt, Phelps & Phillips at 4-5.





<sup>149</sup> Covered entities are classified as small businesses if they satisfy the Small Business Administration's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System ("

*B. Section 610.4 of the Final Amended Rule*

Section 610.4 of the final amended Rule requires all advertisements for “free credit reports” to contain certain prescribed disclosures tailored to the medium used. As such, these disclosures do not constitute a collection of information, as defined by OMB’s regulations that implement the PRA.<sup>151</sup> Accordingly, implementation of section 205 of the Act presents no associated PRA collection of information burden.

*C. Amended Section 610.2 of the Final Amended Rule*

Section 610.2 of the final amended Rule is designed to prevent interference with consumers’ ability to obtain their free annual file disclosures through the centralized source, as permitted by law. Amended section 610.2 does not modify the nationwide CRAs’ original obligation to provide consumers with free annual file disclosures upon request. Nor is amended section 610.2 likely to increase or decrease the estimated number of annual file disclosures made available to

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<sup>152</sup> This figure derives from consultation with FTC staff experienced in web design and operations.

<sup>153</sup> See ([http://www.bls.gov/cwc/comp2008.htm#Wage\\_Table](http://www.bls.gov/cwc/comp2008.htm#Wage_Table)) (National Compensation Survey: Occupational Earnings in the United States 2008, US Department of Labor released August 2009, Bulletin 2720, Table 3) (“Full-time civilian workers,” mean and median hourly wages). The above amount is an average of the mean hourly wages of administrative services managers, computer and information systems managers, computer systems analysts, and network and computer systems administrators.

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<sup>151</sup> See 5 CFR 1320.3(c)(2) (excluding from the definition of “collection of information” the “public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public”).

16, Chapter I, Subchapter F, of the Code of Federal Regulations, part 610, as follows:

**A 10 A A**  
**D**

■ 1. The authority citation for part 610 is revised to read as follows:

A : 15 U.S.C. 1681a, g, and h; sec. 211(a) and (d), Pub. L. 108-159, 117 Stat. 1968 and 1972 (15 U.S.C. 1681j); Pub. L. 111-24.

■ 2. Revise § 610.2 to read as follows:

**10.2**  
(a) *Purpose*. The purpose of the centralized source is to enable consumers to make a single request to obtain annual file disclosures from all nationwide consumer reporting



(vi) Nothing contrary to, inconsistent with, or that undermines the required disclosures shall be used in any advertisement in any medium, nor shall any audio, visual, or print technique be used that is likely to detract significantly from the communication of any disclosure.

(b) *Medi - ecific di clo e* . All offers of free credit reports shall prominently include the disclosures required by this section.

(1) *Tele i io ad e j e e* .

(i) All advertisements for free credit reports broadcast on television shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(ii) The disclosure shall appear at the same time in the audio and visual part of the advertisement. The visual disclosure shall be at least four percent of the vertical picture height and appear for a minimum of four seconds.

(2) *Radio ad e j e e* . All advertisements for free credit reports broadcast on radio shall include the following disclosure in close proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

(3) *P i \_ad e j e e* . All advertisements for free credit reports in print shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *A alC edi\_Re o \_co* or 877-322-8228, the ONLY authorized source under federal law." Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

(4) *I e e eb i e* . Any website offering free credit reports must display the disclosure set forth in paragraphs 610.4(b)(4)(i), (ii), and (v) of this section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

(i) The first element of the disclosure shall be a header that is centered and shall consist of the following text: "THIS

NOTICE IS REQUIRED BY LAW. Read more at *FTC.GOV*". Each letter of the header shall be one-half the size of the largest character of the disclosure text required by 610.4(b)(4)(ii). The reference to *FTC.GOV* shall be an operational hyperlink to (*f.c.go /f ee e o* ), underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box;

(ii) The second element of the disclosure shall appear below the header required by paragraph 610.4(b)(4)(i) and shall consist of the following text: "You have the right to a free credit report from *A alC edi\_Re o \_co* or 877-322-8228, the ONLY authorized source under federal law." The reference to *A alC edi\_Re o \_co* shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to *FTC.GOV* required in paragraph 610.4(b)(4)(i);

(iii) The color of the text required by paragraphs 610.4(b)(4)(i) and (ii) shall be in a high degree of contrast with the background color of the box;

(iv) The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

(v) The third element of the disclosure shall appear below the text required by paragraph 610.4(b)(4)(ii) and shall be an operational hyperlink to *A alC edi\_Re o \_co* that appears as a centered button containing the following language: "Take me to the authorized source". The background of this button shall be the same color as the hyperlinks required by paragraphs 610.4(b)(4)(i) and (ii) and the text shall be in a high degree of contrast to the background of the button;

(vi) Each character of the text in paragraphs 610.4(b)(4)(ii) and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

(vii) Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

(viii) The space between each element of the disclosure required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in paragraphs 610.4(b)(i), (ii), and (v) shall be, at

minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

(5) *I e e ho ed li edia ad e j i g* . All advertisements for free credit reports disseminated through Internet-hosted multi-media in both audio and visual formats shall include the following disclosure in the form specified below and in close proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW.". Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from *A alC edi\_Re o \_co* or 877-322-8228, the ONLY authorized source under federal law." The disclosure shall appear at the same time in the audio and visual part of the advertisement. If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

(6) *Tele ho e e e* . When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents free credit reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

(7) *Tele a ke j g olici a io* . When telemarketing sales calls are made that include offers of free credit reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from *AnnualCreditReport.com* or 877-322-8228, the only authorized source under federal law."

(c) *Effec j e da e* . This section is effective April 2, 2010, except for the wording of the disclosures for television and radio advertisements (paragraphs 610.4(b)(1)(i) and (2)), which are effective on September 1, 2010.

By direction of the Commission.

D a d S. C a

Sec e a

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